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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-..... 76-1093

DRAVO CORPORATION AND
LIBERTY MUTUAL INSURANCE COMPANY,
Petitioners

v.

LOUIS MAXIN AND UNITED STATES
DEPARTMENT OF LABOR, BENEFITS
REVIEW BOARD,
Respondents

THE DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
U. S. DEPARTMENT OF LABOR,
Party Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners respectfully pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit entered in this case on November 15, 1976.

OPINIONS BELOW

This matter arises under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972. The opinion of the Court of Appeals, printed in Appendix "A" hereto, is as yet officially unreported. The judgment of the Court of Appeals is printed in Appendix "B". The decision of the Benefits Review Board, United States Department of Labor, printed in Appendix "C" hereto, is reported in 2 BRBS 372. The decision and Order of the Administrative Law Judge, United States Department of Labor, printed in Appendix "D" hereto, is unreported but there is a synopsis in 1 BRBS 61.

JURISDICTION

The judgment of the Court of Appeals dated November 15, 1976, printed in Appendix "B" hereto, was entered on November 15, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, represents an unconstitutional exercise of the legislative power granted Congress by Article III, Section 2, Clause 1 of the United States Constitution to the extent that the Act as amended in 1972 is construed to extend federal admiralty and maritime jurisdiction landward without limitation to include all employees working in new ship construction.

2. Whether the Longshoremen's and Harbor Workers' Compensation Act as amended in 1972 by its terms extends coverage landward only to employees engaged in maritime employment and excludes a burner employed in metal fabrication preliminary to boat building.

3. Whether the Longshoremen's and Harbor Workers' Compensation Act as amended in 1972 is to be construed as applying to an employee only if disability or death results from an injury occurring upon navigable waters or any adjoining pier, wharf, dry dock, terminal, building way, marine railway or adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel and as excluding a structural shop separated from the employer's boat building facilities.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provisions of the Constitution relevant to this Petition are Article I, Section 8 and Article III, Section 2, Clause, 1:

> The Congress shall have power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, ...
>
> The judicial Power shall extend . . . to all cases of admiralty and maritime jurisdiction . . . .

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:

> Section 2(3), 86 Stat. 1251, 33 USC §902(3):
>
> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker,. . . .
>
> Section 2(4), 86 Stat. 1251, 33 USC §902(4):
>
> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer, in loading, unloading, repairing or building a vessel).

> Section 3(a), 86 Stat. 1251, 1265, 33 USC §903(a):
>
> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

STATEMENT OF THE CASE

Dravo Corporation is a diversified world-wide enterprise which includes many corporate subsidiaries engaged in a variety of operations, products and services. Through its Engineering Works Division, Dravo designs and manufactures barges and large towboats and towboat equipment. The Engineering Works Division of Dravo also engineers and manufactures various steel mill equipment and power plant equipment, including pelletizing machines used to solidify iron ore for the steel industry. Liberty Mutual Insurance Company is the compensation insurer for Dravo.

The Engineering Works Division of Dravo is located on Neville Island, a large inhabited island with a number of industrial tracts, situated on the Ohio River, in Allegheny County, Pennsylvania. The entire facility is split north and south by Grand Avenue, a public thoroughfare. On the north side of Grand Avenue are the marine ways, boat yards, barge shop and other facilities bordering the navigable main channel of the Ohio River. On the south side of Grand Avenue are the

structural shop and other facilities in the Engineering Works Division and the separate facilities of the Dravo Sand and Gravel Division which extend to the partially navigable back channel of the Ohio.

Respondent Louis Maxin was employed by Dravo Corporation on October 29, 1973 when he sustained an injury resulting in below-knee amputations of both legs while working for the Engineering Works Division of Dravo at its plant on Neville Island. At the time of this accident, respondent Maxin was employed as a burner second class in the structural shop. The structural shop is an enclosed facility located approximately 2,000 feet from the navigable main channel of the Ohio River. In the structural shop, Dravo fabricates equipment for non-marine industries and materials and components for marine vessels. Employees in the structural shop work on non-marine equipment possibly fifteen (15) percent of the time and on items to be processed and manufactured into marine equipment eighty-five (85) percent of the time. The fabrication of the marine steel, including pre-forming, processing and shearing, is done in the structural shop, and the steel, in pieces or in components, is then transported to the north side of Grand Avenue where it is then built into pre-assemblies and complete vessels.

Respondent Maxin's work assignments ranged from burning scrap in the scrap box to running a computerized burning machine. On occasion, he did floor burning with a hand torch. Respondent Maxin was not called upon to work in the boat yard, barge shop, marine ways or other areas to the north of Grand Avenue where he might have worked on navigable waters or

areas adjoining navigable waters. At the time of the accident, respondent Maxin was assigned to do regular floor burning in the structural shop with a small machine. When injured, respondent Maxin was burning off corners of pieces of steel which ultimately would serve as the bottom plates and deck plates of completed barges.

Contending that Maxin's injury was compensable only under Pennsylvania law, petitioners contested Maxin's federal compensation claim, which was referred to Administrative Law Judge John I. Nevin for hearing, pursuant to 33 USC 919(d) and 20 C.F.R. 702.331, et seq. Petitioners appealed Judge Nevin's decision and Order sustaining Maxin's claim (Appendix D) to the Benefits Review Board, pursuant to 33 USC 921(b) and appealed the Board's decision affirming Judge Nevin (Appendix C) to the United States Court of Appeals for the Third Circuit, pursuant to 33 USC 921(c). The Court of Appeals affirmed the Benefits Review Board.

REASONS FOR GRANTING THE WRIT

Two cases now before the Court for review *(Northeast Marine Terminal, Inc., et al. v. Ralph Caputo, et al.,* 76-444, and *International Terminal Operating Company, Inc., v. Carmelo Blundo, et al.,* 76-454; reported sub. nom. *Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35, 2d Cir., 1976) seek resolution of conflicts among the courts of appeals respecting coverage of longshoremen under the 1972 amendments. The decision of the Court in these cases, however, will not necessarily resolve questions of coverage of harbor workers and particularly the class of harbor workers who are shipbuilders.

Though the initial cases under the 1972 amendments predominantly have involved longshoring, the courts of appeals have tended to apply the same rationale to cargo handling and marine manufacturing situations. (See, for example, the subsequent discussion of the Third Circuit's adoption in the case below of its rationale in the disposition of a longshoremen's case, *Sea-Land Services, Inc. v. Director, Office of Wkrs.' Comp., Etc.,* 540 F.2d 629 (3d Cir., 1976). Compare also the Fifth Circuit's consolidation and disposition in one decision of two longshoremen's cases and three shipyard workers' cases, *Halter Marine Fabricators, Inc. v. Nulty* reported sub. nom. *Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533 (5th Cir., 1976), petition for certiorari filed December 27, 1976, No. 76-880.) The problems of interpretation that have arisen in the longshoremen cases will thus affect the harbor worker cases as they arise. The Solicitor General in his Memorandum for the Federal Respondent in *Caputo* (p.5) observes: "The Courts of Appeals are in serious conflict concerning the

extent of shoreside coverage under the 1972 amendments to the Act." The Solicitor General adds (p.6): "This conflict among the Circuits is undesirable." Judge Campbell of the First Circuit has called the present divergence of views in the interpretation of the 1972 amendments a "judicial melange." *Stockman v. John T. Clark and Son of Boston, Inc.,* 539 F.2d 264, 268 (1st Cir., 1976). Judge Gibbons of the Third Circuit has described the attempt to interpret the 1972 amendments as "a task of no little difficulty as several diverging opinions demonstrate." *Sea-Land Services, Inc. v Director,* supra, 540 F.2d at p.634. Judge Campbell in *Stockman* quotes this comment of Judge Friendly, writing for the Second Circuit in *Blundo,* supra: "Given the importance of the question, the number of courts of appeals endeavoring to find an answer, and the divergence of opinion already manifested, it seems unlikely that the opinion of any court of appeals will be the last word to be said." *Pittston Stevedoring Corp. v. Dellaventura,* 544 F. 2d at p. 39. These comments of the courts of appeals and the Solicitor General point up the widespread problem and virtually invite the Court to resolve what Judge Campbell calls "the essential ambiguity of the 1972 amendments insofar as they describe, or fail to describe, the employees for whom coverage is afforded." *Stockman v. John T. Clark and Son of Boston,* supra, 539 F.2d at p.265. Judge Campbell notes that the House and Senate Committee Reports "go only part way towards clarifying the application of the 1972 Amendments in the present situation." *Stockman v. John T. Clark and Son of Boston,* 539 F.2d at

p.274. The enormous consumption of judicial time that is involved is apparent.[1]

Difficult questions arise from the ambiguities of the 1972 amendments (e.g, the occupation of shipbuilder is not historically maritime employment and the place where "building a vessel" begins has no point of reference in the amendments). The terms maritime employment and shipbuilder adopted by Congress in the 1972 amendments posit the constitutional issue raised in the court below. In order to resolve problems created by the earlier Act, has Congress enacted legislation which creates federal compensation benefits co-extensive with the limits of maritime jurisdiction? Or, has Congress intended and accomplished something less? Has Congress exceeded the limits of its maritime jurisdiction? Or, if Congress has stayed within those limits, have the Benefits Review Board and the Court of Appeals in the case below exceeded maritime jurisdiction by holding federal compensation benefits to be applicable in the situation of employment presented in the instant case? The Petitioners have urged this latter position in the court below. On close study, it seems that the ambiguity of the amendments and the difficult questions of interpretation which have troubled the courts arise principally from the ambiguity of maritime jurisdiction itself.

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1. The cases cited here and elsewhere in the Petition by no means comprehend all those presently in litigation. Others include: *Parker v. South Louisiana Contractors, Inc.* (5th Cir.) petition for certiorari filed November 8, 1976; *P. C. Pfeiffer Co. Inc. v. Ford* (5th Cir.), petition for certiorari filed November 8, 1976; and *Maritime Terminals, Inc. v. Brown* (4th Cir.), petition for certiorari filed November 19, 1976.

If Congress has exceeded its maritime jurisdiction, may its commerce powers be invoked to sustain the 1972 amendments? To this, the Department of Labor has argued, yes, in its Brief to the Third Circuit in the case below. (Brief for Respondent Director, Department of Labor at pp. 26-27.) The Third Circuit, in an opinion by Judge Gibbons in the case of *Sea-Land Service, Inc. v. Director,* supra, relied upon as authority for its decision in the case below, has held that the 1972 amendments are an exercise of maritime jurisdiction only, noting that invocation of the commerce powers would confer a right to trial by jury in all federal compensation claims, a result not intended by Congress. *Sea-Land Service, Inc. v. Director,* supra, 540 F.2d at p. 635.

Is the term maritime employment, which is undefined in the 1972 amendments, intended by Congress to be co-extensive with its maritime jurisdiction? If so, the courts of appeals are without guidelines to define the limits of maritime employment. A complete examination of the reach of admiralty and maritime jurisdiction in the context of late-twentieth century practices and conditions is needed to resolve the uncertainties created by the use of the undefined term, maritime employment. The Court has not provided a definitive statement in any earlier case that is helpful in the interpretation of problems raised by the 1972 amendments.[2]

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2. Petitioners are mindful of the evolving scope of admiralty and maritime jurisdiction which has come about through statutes enacted by Congress in the past and through decisions of the Court affirming their constitutionality. See the brief history of the enlargement of admiralty and maritime jurisdiction in the opinion of the court below, pp. 9a-11a, footnote 4. As the

Indeed, the Court has left the limits of maritime jurisdiction frustratingly enigmatic, as demonstrated particularly by this statement in *Nacirema Operating Co. v. Johnson,* 396 US 212, 223-224 (1969):

> "There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen line,* the same confusion that previously existed on the seaward side."

The Constitutional issue is not present in the longshoremen cases before the Court. Loading, unloading and repairing a vessel are unquestionably maritime employment. They are the traditional work of seamen shifted by the specialization of modern times to the longshoreman and the harbor worker. The shipbuilder stands in a different category historically. The traditional view that new ship construction and a contract to build a ship are not maritime has not been overruled.

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court below notes, however: "There are, of course, limits—'the concept of the admiralty and maritime jurisdiction,' or 'a proper conception of maritime concerns.' " (Opinion of the court p. 11a, footnote 4.) It is precisely the fact that there are "limits" and that they are undefined for purposes of the 1972 amendments that establishes the need for a new, definitive statement of maritime jurisdiction by the Court.

Under the earlier Act, with limited exceptions, the shipbuilder was covered only when injured upon navigable waters where the situs of the injury established the unquestioned jurisdiction of Congress. The earlier Act did not need the term maritime employment to define its scope. Maritime employment was never an issue.

The uncertainties of the Constitutional limits of admiralty and maritime jurisdiction call for clarification by the Court at this time. A definitive interpretation of maritime employment is needed, consonant with a modern interpretation of maritime jurisdiction. Until then, the difficulties of interpretation and the divergence of opinion in the courts below will continue in application of both the status and situs tests seemingly imposed by Congress in the 1972 amendments. The case below presents an excellent case for review since Maxin worked far back from the areas defined by Congress (e.g., marine way, dry dock, etc.) and in fabrication work indistinguishable from that performed in land industries, except that the material fabricated was intended for new ship construction.

STATUS OF EMPLOYMENT AND SITUS OF INJURY

There is conflict among the courts of appeals, the Benefits Review Board and a leading authority whether Congress intended to condition coverage to a combination of the situs of injury and the status of employment. If so, the employee would be excluded if he failed to satisfy both tests. Within the application of each test there is further conflict. Though the cases to be discussed, with one exception, deal with longshoremen, this should be of no significance, since Congress presumably intended uniform application of the amendments to longshoremen and harbor workers.

A leading commentary urges that the 1972 amendments "be read to cover all employment-related injuries which occur within the Act's territorial limits", Gilmore and Black, *The Law of Admiralty,* §6.51 at page 430 (1975), cited in *Pittston Stevedoring Corp. v. Dellaventura,* supra, 544 F.2d at p. 56. The effect of this view would seem to be to eliminate the status of the worker's employment, either generally or specifically at the time of injury, as a requirement of eligibility.

Speaking for the majority in *Pittston Stevedoring Corp. v. Dellaventura,* supra, Judge Friendly "part[s] company" with the commentators (544 F2d at p. 56) and holds that two longshoremen who met the situs requirements were covered under the specific facts of their employment (status). Judge Friendly decided that the amendments at least covered any person engaged in handling cargo up to the point where the consignor has begun its movement from the pier, provided the employee had spent a significant part of his time in "the typical longshoring activity of taking cargo on and off

a vessel." Noting that some would conclude that this "construction reads the status requirement out of the Act", Judge Friendly concedes the decision "goes some way in that direction." If the employee was not directly involved with taking cargo on or off a vessel when he was injured, Judge Friendly apparently would require that he show that a significant part of his activity consisted of such work. Judge Lumbard, concurring and dissenting, felt the Court should apply the point of rest rule as more in keeping with the realities of maritime employment and easier to apply.

Judge Campbell of the First Circuit seems to adopt a similar approach to Judge Friendly, in his opinion in *Stockman v. John T. Clark & Son of Boston,* supra. In Judge Campbell's view, if an employee is a longshoreman in the sense of being involved in some stage of the movements of cargo on and off shipboard, the fact that the work is so organized by his employer that his individual duties do not happen to take him on shipboard is not controlling. Judge Friendly seems to require the employee to establish his eligibility on the basis of his own individual activity, or status, whereas Judge Campbell would allow him eligibility if he is part of an employee group, some of whom would be engaged in shipboard activity:

> "We read the language of the Committee reports as requiring bona fide membership in a class of employees whose members would for the most part have been covered some of the time under the earlier Act—not necessarily a demonstation by each claimant that he individually would have been covered.
>
> "This is not to say that workers who are not plainly longshoremen, or otherwise plainly included in

some recognized category of maritime employment, may not have to demonstrate their entitlement to coverage by showing that their duties encompass shipboard activity." *Stockman v. John T. Clark & Son of Boston,* supra, 539 F.2d at p. 277.

The Ninth Circuit in *Weyerhaeuser Company v. Gilmore,* 528 F.2d 957, (1975) seems to go further than Judge Campbell and adopt the position of Judge Friendly. The Ninth Circuit emphasizes the importance of what the employee individually does in determining his status:

". . . Accordingly we believe that to be entitled to the benefits of LHCA, an employee's employment must have a realistic relationship to the traditional work and duties of a ship's service employment. Otherwise the clear and unambiguous congressional language of 'maritime employment' is nullified and rendered to read 'any employment.'

"We hold that for an injured employee to be eligible for federal compensation under LHCA, his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters,' with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in §903." (528 F.2d at p. 961.)

Both the First Circuit and the Second Circuit seem to suggest that an employee who would not have been covered under the earlier Act for any part of his work,

because his duties never took him on shipboard, gains coverage under the 1972 amendments by reason of being a member of a class of employees (e.g., longshoremen) some of whom have duties which take them aboard ship. Thus, Judge Friendly includes any longshoreman who strips or stuffs a container since such work directly relates to the removal and placement of cargo aboard ship. The effect of this view would seem to be to broaden the class of employees eligible, particularly as the employee gains eligibility, in Judge Campbell's view, not only by the specifics of the work he performs but also by the shipboard activity of other employees whose work is closely related. This view conflicts with the interpretation of the Fourth Circuit that the amendments broaden the area of coverage (situs) but narrow the class of persons covered (status). In *I.T.O. Corp. of Baltimore v. Ben. Rev. Bd.,* 529 F.2d 1080, (1975)—(rehearing en banc reported in 542 F.2d 903[3])—Judge Winter, for the majority, addresses himself to this point:

"Sections 2 and 3 of the present Act establish a dual test for coverage. The situs requirement has been retained, with the definition of 'navigable waters' expanded to include certain specified land areas. In addition, a new 'status' test has been added: the person injured ('employee') must have been engaged in 'maritime employment,' a concept which is nowhere defined but which includes 'longshoring operations.' The net effect of the 1972

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3. Upon re-hearing by the Court of Appeals en banc, the award of the Benefits Review Board to one claimant was reversed. By an equally divided court, the awards to two claimants were affirmed. (542 F.2d at p. 905.)

> Amendments was therefore to *broaden* the area in which an injury would be covered, and *narrow* the class of persons eligible according to job function." [Emphasis in original.] (529 F.2d at p. 1083.)

In *I. T. O. Corp. of Baltimore v. Ben. Rev. Bd.*, supra, Judge Winter wrote for the majority that, "with respect to longshoremen or other persons engaged in longshoring operations, the Amendments extend only to those employees engaged in loading and unloading activities between the ship and the first (last) point of rest, including checkers 'directly involved in [such] loading or unloading functions.'" 529 F.2d at p. 1088. Judge Craven dissented, rejecting the point of rest rule which was also rejected by Judge Campbell in *Stockman,* supra, and rejected by Judge Friendly in *Dellaventura,* supra, but approved by Judge Lumbard in his dissent in *Dellaventura.*

In the case below, the Third Circuit held that "Maxin's employment functions for Dravo at Neville Island were an integral part of the new ship construction activities conducted there" and that, therefore, "the claimant satisfied the 'functional relationship' test of *Johns.*" The reference to "Johns" is to the opinion of Judge Gibbons for the Third Circuit reported sub nom *Sea-Land Services, Inc. v. Director,* supra. Judge Gibbons has commented in *Sea-Land* that Judge Craven's perception of the Congressional intention (in his dissent in *I. T. O. Corp. of Baltimore v. Ben. Rev. Bd.,* supra) and that of the Third Circuit panel of Judges Aldisert, Gibbons and Garth in *Sea-Land* are "essentially the same." This view perceives longshoring under the statute as a continuous process involving different employees which continues at all times while the cargo is

"in maritime commerce as distinguished from land commerce." *(Sea-Land Services Inc. v. Director,* supra, 540 F.2d at p. 639.)

The conflict in the courts of appeals on the point of rest doctrine has important bearing to the issues presented for review in the case below. Petitioners have urged in the court below the adoption of a high water mark, so to speak, for what should be considered shipbuilding, analagous to the point of rest doctrine in longshoring. Petitioners have urged that maritime employment and the term shipbuilder should be limited to activity extending shoreward only as far as "the place where the keel or the bottom of the vessel is laid down and the vessel begins the progressive steps of assembly which culminate in its launching." (Petitioners' Brief in the court below at page 39.)

The decision of the court of appeals in the case below cannot be understood without reference to the rationale of Judge Gibbons in his opinion in *Sea-Land Services, Inc. v. Director,* supra. *Sea-Land* not only attaches paramount importance to the status test (maritime employment), but goes far toward raising status as the sole criterion of eligibility to the exclusion of any consideration of the situs of the injury. (The longshore employee, Johns, sustained his injury on a public highway. The Third Circuit remanded this case to the Benefits Review Board for further evidence "bearing upon the specific function of Johns at the time of injury.") Judge Gibbons concludes:

> ". . . As long as the employment nexus (status) with maritime activity is maintained, the federal compensation remedy should be available. Resuscitating the situs requirement in cases satisfying the

> status test will interfere with Congress' intention to eliminate the phenomenon of shifting coverage. It is the situs of the vessels in maritime commerce, not the situs of their maritime employees at the time of the injury, that in our view Congress referred to by its reference to navigable waters."

Judge Gibbons concedes "that the draftsmanship of the 1972 amendments leaves something to be desired, and to a certain extent, obscures this purpose from view." *Sea-Land Service, Inc. v. Director,* supra, 540 F.2d at p. 638.

Petitioners have contended below that a structural shop 2,000 feet from navigable waters cannot be an adjoining area within the meaning of §903(a). The court below rejected this contention, stating that the contention had been answered in *Sea-Land* where plaintiff was injured when his flatbed truck overturned on a public street in Port Elizabeth, New Jersey. (*Sea-Land* was decided after the appeal was filed in the case below.) Despite the marine character of the specific areas enumerated by Congress in §902(4) and 903(a), the Third Circuit in *Sea-Land* did "not construe this enumeration of covered areas to be an exclusive enumeration" and held that Congress intended "to provide a federal workmen's compensation remedy for all maritime employees." (540 F.2d at p. 638.) It is clear that the Third Circuit's interpretation will result in virtual elimination of the situs test and the foundation of a line of future cases which will be in conflict with decisions in the other circuits, in this respect at least. Though the Benefits Review Board and the Court of Appeals reach the same result in the case below and in

Sea-Land, it appears that the Third Circuit favors giving even more liberal scope to the 1972 amendments than the Benefits Review Board would do. The Benefits Review Board preserves the situs test.

Lastly, one case decided in the Fifth Circuit seems closest on its facts and on its decision to the case below. The case is *Halter Marine Fabricators, Inc., v. Nulty,* reported sub. nom. *Jacksonville Shipyards, Inc. v. Perdue,* supra, petition for certiorari filed December 27, 1976, No. 76-880. There are a number of similarities between Nulty and the claimant in the case below. Nulty was a carpenter who was making a part in a carpentry shop which a ship fitter would install on a new vessel which was not yet completed but launched and in navigable waters. If the Court chooses to review Nulty the decision could control the case below, but it is not necessarily certain that it would. There are factual differences as well. Nulty's employer is engaged only in new ship construction; Dravo's structural shop makes a diversity of products for land and marine uses. Nulty did nothing but marine work. In the case below, claimant Maxin and other employees in Dravo's structural shop engaged in making land and marine products. The distance of Dravo's fabrication shop from the water's edge is substantially greater (2,000 feet) than the distance of Halter Marine's carpentry shop from the water (300 feet).

Whether or not the Court chooses to review *Nulty,* it is respectfully submitted that the Court should grant certiorari in the case below. The claimant in the case below is an employee working well outside the shoreside areas enumerated by Congress as covered, and he performed fabrication work common to marine and land

industries according to his work assignment. The decision of the court in the case below would be dispositive of a large number of cases involving employees other than longshoremen which may be expected to arise. Other cases are presently pending, according to information received by the petitioners, in the Fourth Circuit. If the Court elects to review *Nulty*, it is respectfully submitted that *Nulty* and the case below should be consolidated with the two longshoremen cases (Caputo and Blundo) from the Second Circuit which the Court has agreed to review.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted and arguments in this case and in numbers 76-444 and 76-454 should be set consecutively or consolidated.

Respectfully submitted,

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Certificate of Service.

CERTIFICATE OF SERVICE

I, Frederick N. Egler, one of the attorneys for petitioners in the above-titled proceeding, being a member of the Supreme Court of the United States, do hereby certify that coincident with the filing of this Petition, I have served copies of the Petition for Writ of Certiorari, together with the appendix attached thereto, by mailing copies thereof in duly addressed envelopes postage pre-paid to, Daniel W. Cooper, Esquire, Gatz, Cohen, Segal & Koerner, Attorneys for Respondent Maxin, and William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor and Joshua T. Gillelan, II, Esquire, Attorney, United States Department of Labor, Suite N-2716, New DOL Building, Washington, D.C. 20210 and to the Solicitor General, Department of Justice, Washington, D.C. 20530.

FREDERICK N. EGLER

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Appendix A.

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 75-2403

DRAVO CORPORATION and LIBERTY MUTUAL INSURANCE COMPANY,
Petitioners

v.

LOUIS MAXIN and UNITED STATES DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD,
Respondents

THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR,
Party Respondent

(BRB NO. 75-145)

ON PETITION FOR REVIEW OF A DECISION OF THE BENEFITS REVIEW BOARD

Argued September 10, 1976

Before: VAN DUSEN, HUNTER and WEIS, *Circuit Judges*.

FREDERICK N. EGLER,
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Pittsburgh, Pa.

Attorneys for Petitioners

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LAURIE M. STREETER,
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JOSHUA T. GILLEILAN, II,

Attorney, U. S. Department of Labor
Washington, D.C.

Attorneys for Party Respondent, Director, Office of Workers' Compensation Programs, U. S. Department of Labor

---

Opinion of the Court

(Filed November 15, 1976)

VAN DUSEN, *Circuit Judge.*

This is a petition by an employer to review an October 20, 1975, decision (100a-104a) of the Benefits Review Board (BRB), United States Department of Labor, affirming the decision of the administrative law judge that the claimant, Louis Maxin, was covered by the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972.[1] Although Judge Gibbons stated in his recent opinion in *Sea-Land Service, Inc., et al. v. Director, etc., and Wallace C. Johns,* ..... F. 2d ....., Opinion of Aug. 5, 1976 (3d Cir. No. 75-2039) (hereinafter *Johns*), which involved a claimant allegedly engaged in longshoring operations, that the above 1972 Amendments "manifest an unmistakeable congressional intention to afford federal coverage for injuries occurring in areas *inland* of the navigable waters of the United States,"[2] *id.* at 8, this case is the first time that we have considered whether Congress

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1. Act of October 27, 1972, Pub. L. No. 92-576, 86 Stat. 1251 (codified in scattered sections of 33 U.S.C. §901-49) (Supp. IV, 1974).

2. At page 12 of the *Johns* opinion, Judge Gibbons concluded:

> ". . . it should be within Congress' legislative jurisdiction under Article III, Section 2 to provide a remedy for persons injured in the course of maritime employment, irrespective of the place of injury. It is the existence of the special employer-employee relationship, and not the situs of that relationship, that is significant for purposes of admiralty jurisdiction."

At page 16, Judge Gibbons stated:

> "Congress . . . intended to expand the scope of the LHWCA to provide a federal workmen's compensation remedy for all maritime employees. We believe that Congress has exercised in full its legislative jurisdiction in admiralty. As long as the employment nexus (status) with maritime activity is maintained, the federal compensation remedy should be available. Resuscitating the situs requirement in cases satisfying the status test will interfere with Congress' intention to eliminate the phenomenon of shifting coverage."

See page 6 and note 3 below.

could constitutionally extend the coverage of the LHWCA to land based workers in the shipbuilding industry. We affirm the October 20, 1975, decision of the BRB.

There is little dispute concerning the essential facts. The claimant, Louis Maxin, is an employee of Dravo Corporation (hereinafter "Dravo") who, on October 29, 1973, sustained an injury resulting in below-knee amputations of both legs while working for Dravo's Engineering Works Division (EWD) at its plant on Neville Island near Pittsburgh, Pennsylvania. At the time of his injury, Maxin was working in the Neville Island structural steel shop, his usual place of employment, burning steel plates which would ultimately become bottoms and decks of barges fabricated by Dravo at the Neville Island facility.

Neville Island is located in the the Ohio River, a navigable waterway. The plant is closest to the southern shore of the river and generally extends towards the north. The main stream of the river is on the north side of the facility. On the south side is a lesser stream called the back channel. The entire facility is split north and south by Grand Avenue, a public thoroughfare. On the north side of Grand Avenue are the marine ways, boat yards, barge shop and other facilities of the EWD. On the south side of Grand Avenue are the structural shop and other facilities of the EWD (as well as the separate facilities of the Sand and Gravel Division), extending to the back channel which is navigable for most of its length. Historically, certain areas of the plant have always been considered by the parties to be subject to the jurisdiction of the LHWCA. This area includes the marine ways and the launching ways im-

mediately adjacent to the water's edge on the north side. EWD designs and builds large tow boats, barges, steelmill equipment, and power plant equipment.

In addition to the structural shop, eight major areas of the Neville Island facility can be identified as connected with boat building or repair. The enclosed structural shop is about 2000 feet from the north channel of the river. In the structural shop, pre-assembly components of all types, including those of barges, towboats, damlocks, engine foundations, etc., are carried out. Some of the components such as "rake ends" range from 40 to 60 feet in width and 20 feet in length. Components fabricated in the structural shop are transported on rail cars to other areas for assembly. The major raw material used in the construction of vessels is steel. The majority of the steel is delivered to a storage area adjacent to the structural shop by truck or rail car. It is then brought into the structural shop as needed, where it is shaped, cut, punched and welded to the desired configuration.

In addition to marine construction, pelletizing machines and "feeders," which are used in handling iron ore and in making steel, are also built in the structural shop. No other areas in the facility beside the structural shop are used for other than marine fabrication. During the previous 12-month period, about eight pelletizing units were built. In that same period, about 300 barges and towboats were constructed. The employees in the structural shop may spend 15% of their time on non-marine work and 85% on marine work. 90% of the raw steel delivered to the shop finds its way into the marine products. The employees are assigned as needed; they do not specialize in either marine or non-marine work.

Grand Avenue generally separates the structural shop from the pre-assembly and final assembly areas. To the extent that employees in the structural shop may be assigned to non-shipbuilding activities, the assignments are incidental and sporadic as the needs of the moment dictate. There is no delineation of labor between shipbuilding and non-shipbuilding functions (for example, the manufacture of pelletizing machines and "feeders").

On this appeal, Dravo raises a number of contentions challenging the award made to the claimant, as follows:

> I. The Congress could not constitutionally extend coverage under the LHWCA landward to employees working in new ship construction.
>
> II. Maxin, as a burner employed in metal fabrication at a preliminary stage of boat building, was not a shipbuilder or maritime employee within the meaning of the 1972 Amendments.
>
> III. The injury did not take place at a situs within the landward extension of the 1972 Amendments.

I. The Constitutionality of Extension of Coverage Under the LHWCA to the Shipbuilding Industry

A. *The Landward Extension*

The 1972 Amendments extended the coverage of the earlier Longshoremen's and Harbor Workers' Compensation Act of 1927 (hereinafter "1927 Act") landward to employees "engaged in maritime employment" who were already covered by the 1927 Act while working upon navigable waters. *Sea-Land v. Johns, supra* at 13-14. Prior to the enactment of the 1972 Amendments, the Supreme Court had clearly indicated in a number of opinions that the coverage of the 1927 Act, ending at the water's edge, was not coterminous with the full geographical extent of the limits of maritime jurisdiction. See, *e.g., Nacirema Operating Co. v. Johnson,* 396 U. S. 222, 223-24 (1969). This history has already been extensively reviewed in a recent opinion of this Circuit, see *Johns, supra* at 12, deciding that, in a case such as this, Congress' landward extension of the LHWCA's coverage was authorized by the United States Constitution (see footnotes 2 above and 4 below).

B. *The Subject Matter Extension*

The revised definition of "employee" in 33 U. S. C. § 902(3), as amended (§ 2(4) of P. L. 92-576, which contains the 1972 Amendments),[3] provides:

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, *shipbuilder,* and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." (Emphasis supplied.)

We note that although new ship construction contracts and the vessel itself until launched have been held *traditionally* not to be a subject of maritime jurisdiction, *North Pacific S. S. Co. v. Hall Brothers Marine Ry. & Shipping Co.,* 249 U. S. 119 (1919); *The General Smith,* 17 U. S. (4 Wheat.) 438 (1819), shipbuilding employees were covered under the LHWCA prior to the 1972 Amendments if they were injured while working on new vessels under construction and afloat upon navigable waters. *E. g., Calbeck v. Travelers Insurance Co.,* 370 U. S. 114 (1962). This case, therefore, is not one that involves extension of the LHWCA to a class of employees who were entirely outside of the Act's coverage prior to 1972. As stated in *Johns, supra* at 13-14:

> "[T]he dominant purpose of the 1972 Amendment in extending the Act's coverage to areas previously

3. Changes made by the 1972 Amendments to the earlier Act which are pertinent to this opinion have recently been extensively reviewed by this Circuit. See *Johns, supra* at 4-8.

> left to the states was to make more uniform the death and disability compensation system for maritime employees so that maritime workers *would no longer walk into federal coverage and out of state coverage, and vice versa, in the course of a day's work.* (Emphasis supplied.)

The reasoning of Judge Gibbons in *Johns* and the result in *Calbeck* support our conclusion that a landward extension of the LHWCA to shipbuilding employees such as Maxin was a constitutional exercise of Congress' Article III power.

Our conclusion is reinforced by the consideration that when, on a number of other occasions, the Congress altered the substantive rules of maritime law or enlarged the classes of cases falling within the admiralty and maritime jurisdiction itself, the Supreme Court of the United States has sustained the congressional determination.[4] In *Detroit Trust Co. v. The Thomas Barlum,*

4. In *The Genesee Chief,* 53 U. S. (13 How.) 443 (1852), the Court sustained an 1845 act of Congress which extended the federal admiralty jurisdiction to inland waterways, thereby overruling *The Thomas Jefferson,* 23 U. S. (10 Wheat.) 428 (1825), which had held that the jurisdiction was limited by the English determinant, "within the ebb and flow of the tide." Since then Congress has on a number of other occasions not only altered the substantive rules of maritime law, but enlarged the classes of cases which fall within the jurisdiction itself.

For instance, originally, the position that admiralty jurisdiction over torts depended on the place where the wrong was consummated was regarded as too fundamental for argument. *The Plymouth,* 70 U. S. (3 Wall.) 20 (1866). When Congress, however, extended the jurisdiction to damage to shore structures caused by vessels for the limited purpose of limitation of liability proceedings, Act of June 26, 1884, c. 121, § 18, 23 Stat.

293 U. S. 21 (1934), the Supreme Court discussed Congress' authority to confer admiralty and maritime jurisdiction on the federal courts in classes of cases which had previously been held by the Court to be outside the jurisdiction:

> "The Congress [rests] its authority upon the constitutional provisions extending the judicial power 'to all cases of admiralty and maritime jurisdiction' and conferring upon the Congress the power to make all laws which shall be 'necessary and proper' for carrying into execution all powers 'vested by this Constitution in the government of the United States, or in any department or officer thereof.' Art. III, § 2; Art. I, § 8, par. 18. This authority was not confined to the cases of admiralty and maritime jurisdiction in England when the Constitution was

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57, 46 U. S. C. § 189, the Supreme Court refused to construe the statutory provision narrowly in order to limit it to the previously recognized scope of the jurisdiction. *Richardson v. Harmon,* 222 U. S. 96 (1911). Finally, in 1948, Congress extended the jurisdiction to all injuries on land caused by vessels, for *all* purposes. Admiralty Extension Act, 62 Stat. 496 (1948), 46 U. S. C. § 740. This general extension of the jurisdiction to torts previously considered in American law to be non-maritime was upheld as well. *United States v. Matson Navigation Co.,* 201 F. 2d 610 (9th Cir. 1953), cited with apparent approval in *Victory Carriers, Inc. v. Law,* 404 U. S. 202, 209 n. 9 (1971).

Congress in 1910 brought within the cognizance of admiralty jurisdiction, by allowing a lien *in rem,* contracts for repairs or supplies furnished a vessel in her home port, Act of June 23, 1910, c. 373, 36 Stat. 604, as amended, 46 U. S. C. §§ 971-75 (the Federal Maritime Lien Act), one of the classes of contracts whose exclusion from the jurisdiction had been relied upon in *People's Ferry Co. v. Beers,* 61 U. S. (20 How.) 393

> adopted. *Waring v. Clarke,* 5 How. 441, 457, 458. The limitations which had been imposed upon the high court of admiralty in the course of its controversy with the courts of common law were not read into the grant. But the grant presupposed a 'general system of maritime law' which was familiar to the lawyers and statesmen of the country, and contemplated a body of law with uniform operation. *The Lottawanna,* 21 Wall. 558, 574, 575. The Constitution did not undertake to define the precise limits of that body of law or to lay down a criterion for drawing the boundary between maritime law and local law. *Id.* Boundaries were to be determined in the exercise of the judicial power in recognition

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(1857); and its power to do so was sustained. *E. g., Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.,* 254 U. S. 1 (1920); *United States v. Carver,* 260 U. S. 482 (1923). Further, in 1920, Congress extended the jurisdiction to ship mortgages generally, Act of June 5, 1920, c. 250 § 30, 41 Stat. 988, 1000, as amended, 46 U. S. C. § 911 *et seq.,* notwithstanding that they had previously been declared non-maritime contracts by the Supreme Court, *Bogart v. The John Jay,* 58 U. S. (17 How.) 399 (1854); and the extension was sustained in *Detroit Trust Co. v. The Thomas Barlum,* 293 U. S. 21 (1934). There are, of course, limits—"the concept of the admiralty and maritime jurisdiction," or "a proper conception of maritime concerns." But the previous restrictive decisions so strongly influenced by the narrow restraints placed on the Admiralty in England provide little guidance as to the scope of the concept. Rather, the broader view of what is "maritime" in the "general maritime law" provides the basis of analysis of what may properly be so designated within the constitutional grant. See also, *e. g., United States v. Webb, Inc.,* 397 U. S. 179, 191 (1968); *Panama Railroad Co. v. Johnson,* 264 U. S. 375, 386 (1924); *The Lottawanna,* 88 U. S. (21 Wall.) 559, 576 (1875).

of the purpose of the grant. 'No state law can enlarge it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits.' *The St. Lawrence,* 1 Black 522, 527. The framers of the Constitution did not contemplate that the maritime law should remain unalterable. The purpose was to place the entire subject, including its substantive as well as its procedural features, under national control. From the beginning the grant was regarded as implicitly investing legislative power for that purpose in the United States. When the Constitution was adopted, the existing maritime law became the law of the United States 'subject to power in Congress to modify or supplement it as experience or changing conditions might require.' *Panama Railroad Co. v. Johnson,* 264 U. S. 375, 385-387. The Congress thus has paramount power to determine the maritime law which shall prevail throughout the country. *The Lottawanna, supra,* p. 577, *Butler v. Boston & Savannah S. S. Co.,* 130 U. S. 527, 557; *In re Garnett,* 141 U. S. 1, 13; *Southern Pacific Co. v. Jensen,* 244 U. S. 205, 215; *Crowell v. Benson,* 285 U. S. 22, 39; *United States v. Flores,* 289 U. S. 137, 148, 149, But in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction . . .

* * *

"The fact [that earlier court decisions had held the subject matter to be without the maritime jurisdiction] was not conclusive as to the constitutional authority of the Congress to alter or supplement the maritime law in this respect, and thus to extend

the admiralty jurisdiction, 'as experience or changing conditions might require,' while keeping within a proper conception of maritime concerns . . .

* * *

"The authority of the Congress to enact legislation of this nature was not limited by previous decisions as to the extent of the admiralty jurisdiction. We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned . . ."

Id. at 42-44, 48, 52 (footnotes omitted). We conclude the standard of *The Thomas Barlum* has been met in 33 U. S. C. § 902(3).[5]

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5. Our conclusion in this case finds further support from an analysis of the legislative history of the 1972 Amendments. The extended coverage afforded by the 1972 Amendments was the result of compromise between competing interests which substantially raised the workmen's compensation benefits payable under the Act and as a trade-off to the employers, overruled the *Sieracki-Ryan* liability. See *Johns, supra* at 13; *Griffith v. Wheeling Pittsburgh Steel Corporation,* 521 F. 2d 31, 38-40 (3d Cir. 1975); *see also* Comment, Negligence Standards Under the 1972 Amendments to the Harbor Workers' and Longshoremen's Compensation Act: Examining the Viewpoints, 21 Vill. L. Rev. 244, note 17, 246 (1976). Shipbuilders and shipbuilding employees, as well as longshoremen and stevedores, were parties to the compromise. See, *e. g.,* Hearings on S. 2318, S. 525, S. 1547. Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. (1972), at 174-77 & 820-21.

II. The Claimant's Status

On this appeal, Dravo argues that shipbuilding is "sufficiently distinct from fabrication to provide an appropriate limit" for the Act's coverage only at "the place where the keel or bottom of the vessel is laid down and the work of shipbuilding can properly be said to commence." Dravo's brief at 28-32. We reject this approach for two reasons: first, this court has already examined and rejected an analogous view held by the Fourth Circuit in regard to longshoring operations, see *Johns, supra* at 17-18; second, implementation by us of Dravo's suggested distinction would, in effect, partially overrule *Johns, supra,* where the analysis focused principally on the relationship between the employer and the claimant. In addition, Dravo's test would resurrect the pre-1972 problem of *excessive* litigation caused in part by pre-1972 judicial doctrines[6] which the Congress attempted to discard by extending the coverage of the LHWCA landward. Moreover, the test proposed would arbitrarily foreclose otherwise meritorious claims simply because of the definition placed by the employer upon the employment relationship. This disposition would be unfortunate insofar as it would tend to confine the judicial inquiry into a mere search for labels and talismanic rubrics. We note that other courts have rejected similar labeling approaches. See, *e. g., Jacksonville Shipyards, Inc. v. Perdue,* Opinion of September 27, 1976 (5th Cir., Nos. 75-1659, 75-2833, 75-2289, 75-2317, 75-4112).

In *Johns, supra* at 12, this Circuit held that the test of coverage under the landward extension of the 1972 Amendments was to be a "status" test related to the

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6. See G. Gilmore & C. Black, The Law of Admiralty, §§ 6-48, 6-49 (2d ed. 1975).

employee's function in the employer's operation and dependent upon "the existence of [a] special employer-employee relationship and not the situs of that relationship." Having concluded that Congress could extend the coverage of the LHWCA to land-based shipbuilders, we must now determine if the BRB properly concluded that the claimant's employment relationship with Dravo fell within the parameters of the term "shipbuilder."[7]

Unfortunately, the term "shipbuilder" was not defined by the Congress in the 1972 Amendments; therefore, we must resort to other sources to determine if the

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7. On this appeal, the Director, Office of Workers' Compensation Programs, United States Department of Labor, has argued at some length that we should defer to the BRB's determination of the employees and areas within the extended coverage of the LHWCA. See Director's brief at 29-34. Among other suggestions made by the Director is his contention that 33 U. S. C. § 920(a) creates a "statutory presumption 'that the claim comes within the provisions of this Act.' " Brief at 31. Because the record makes clear that the claimant was a § 2(4), 33 U. S. C. § 902(3), as amended, "employee," we have no need to decide these contentions at this time, except to note that several other circuit court panels have reached these issues with mixed results. See, *e. g., Stockman v. John T. Clark & Son of Boston, Inc.,* Opinion of July 27, 1976 (1st Cir., No. 75-1360) at 9-12; *Pittston Stevedoring Corp. v. Dellaventura,* Opinion of July 1, 1976 (2d Cir. Nos. 76-4042, 76-4009, 76-4043, 75-4249), at 4699-4710; but see *Perdue, supra* at 6000-01 of slip opinion. In cases based on claims arising before the effective date of P. L. 92-576, the presumption created by 33 U. S. C. § 920(a) was held to limit judicial review of determinations that injuries arose out of the employment. See, *e. g., Continental Insurance Co. v. Burn,* 471 F. 2d 257 (7th Cir. 1972); *cf. Overseas African Construction Corp. v. McMullen,* 500 F. 2d 1291 (2d Cir. 1974); *Motteler v. J. A. Jones Construction Co.,* 457 F. 2d 917 (7th Cir. 1972).

functional relationship of Maxin's activities to Dravo's shipbuilding operations was maritime in character. The Encyclopaedia Britannica offers a general outline of shipbuilding and ship repair activities. In 20 Encyclopaedia Britannica 410-13 (1967), under the heading, "Steps In Constructing A Ship," the following language appears:

> "Fabrication and Assembly.—The plate and angle shop shears, acetylene torch equipment, planers, bending rolls, presses, furnaces, drill and counter-sink machines and other equipment prepare the finished steel plates and shapes ready for subassembly or for erection in the ship. After fabrication, the plates and shapes, if riveted, are usually moved directly to the ship by cranes; shipwrights then adjust them in final positions and secure them by a few bolts passed through the rivet holes."

Comparison of the Britannica's outline with Dravo's structural shop operations at Neville Island compels the conclusion that functionally both are substantially identical. On the facts of this case, it is clear that Maxin's employment functions for Dravo at Neville Island were an integral part of the new ship construction activities conducted there. We conclude, therefore, that the claimant satisfied the "functional relationship" test of *Johns* and that this record shows that there is a reasonable legal basis for the BRB's conclusion.[8]

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8. We find reinforcement for this conclusion in the recent *Perdue* opinion of the Fifth Circuit, where that court affirmed a BRB determination of LHWCA coverage of claimant Nulty in circumstances substantially similar to those in this case. See *Perdue, supra* at 6003 of slip opinion.

III. The Situs of the Injury

Dravo contends that the structural shop was not an area within the extended coverage of 33 U. S. C. § 903(a), as amended (§ 3(a) of P. L. 92-576), which provides:

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel) . . ."

With regard to this issue, Dravo again advances the argument that the coverage of the 1972 Amendments "should extend no further than the place where the keel or bottom of the vessel is laid down and the vessel begins the progressive steps of assembly which culminate in its launching." Brief at 39. In addition, Dravo suggests that because the structural steel shop was a distance of 2000 feet from the north channel and separated from most of the Neville Island facilities by Grand Avenue,[9] it cannot be an "adjoining area" within the meaning that Congress intended the courts to impart by the wording of § 903(a), as amended. The answer to these contentions was recently provided in *John's supra* at 16, where, in discussing the extent of the ex-

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9. We note that the situs of the injury in *Johns* was a public street. Although the panel in that case remanded for further fact findings, it was clear that the panel felt the "situs" might be a proper one under 33 U. S. C. § 903(a), as amended.

panded coverage of the 1972 Amendments, Judge Gibbons said:

> "The reference in § . . . 903(a) to the navigable waters of the United States should be regarded as no more than a shorthand way of relating the function being performed by the injured employee to waterborne transportation, the jurisdictional nexus. We recognize that both of these statutory provisions, as amended in 1972, further state that the 'navigable waters' shall include 'any adjoining pier, wharf, dry dock, terminal, building van, marine railway, or other adjoining area customarily used by an employer in loading, unloading; repairing, or building a vessel.' *But we do not construe this enumeration of covered areas to be an exclusive enumeration.*"[10]
>
> (Emphasis supplied.)

Our analysis in part II above and the wording quoted above from *Johns, supra,* provides an adequate answer to Dravo's contentions. To the extent that situs has relevancy under *Johns,* we conclude that Dravo's Neville Island structural steel frabrication shop is covered by the Act. The Neville Island facility adjoins navigable waters. The great majority of the work performed in the shop is related to shipbuilding or ship repair. There is no delineation of the work into shipbuilding and non-ship building functions. Thus, the structural steel shop and the work performed there is an integral part of Dravo's shipbuilding operations at the complex. Because we feel the Congress was familiar with the assembly-

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10. The next four sentences of the *Johns* opinion are quoted above at note 2.

line methods employed in American manufacturing, we hold that the congressional intent underlying the extension of the LHWCA is best effectuated by extending coverage to the labor force in such a building once the "functional relationship" test of *Johns* has been met.

The petition for review will be denied and the order of the Benefits Review Board will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

.....

Circuit Judge

Judgment.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 75-2403

DRAVO CORPORATION and LIBERTY MUTUAL INSURANCE COMPANY,
Petitioners
v.
LOUIS MAXIN and UNITED STATES DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD,
Respondents
THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR,
Party Respondent

(BRB NO. 75-145)

ON PETITION FOR REVIEW OF A DECISION OF THE BENEFITS REVIEW BOARD

Present: VAN DUSEN, HUNTER and WEIS, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the Benefits Review Board, United States Department of Labor, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the petition for review be, and the same is hereby denied and the order of the said Benefits Review Board, filed October 20, 1975, is affirmed. Costs taxed against the petitioners.

ATTEST:
THOMAS F. QUINN
CLERK

November 15, 1976

Appendix C.

APPENDIX "C"

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D.C. 20210

Filed as part of the record, October 20, 1975
CAROLYN D. MCCREADY, Clerk

LOUIS MAXIN
Claimant-Respondent
v.
DRAVO CORPORATION
and
LIBERTY MUTUAL INSURANCE COMPANY
Employer/Carrier
Petitioners
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party in Interest

} BRB NO. 75-145 DECISION

Appeal from Decision and Order of John I. Nevin, Administrative Law Judge, United States Department of Labor.

Daniel W. Cooper, Pittsburgh, Pa., for claimant.

Frederick N. Egler (Egler, McGregor & Reinstadtler), Pittsburgh, Pa., for employer/carrier.

Joshua T. Gillelan, II (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

This is an appeal by the employer and insurance carrier (hereinafter, the employer) from a Decision and Order (74-LHCA-298) of Administrative Law Judge John I. Nevin. The petitioners allege that the Decision and Order is contrary to law. The claim was filed pursuant to the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter referred to as the Act).

Claimant, a second class burner, was injured in the course of his employment in the structural shop when a stack of steel plates fell and amputated both of his legs below the knees. The employer is continuing to pay temporary total disability benefits under the Pennsylvania state act and is providing rehabilitation therapy; the degree of permanent disability will be determined when claimant reaches maximum recovery.

The issues before the administrative law judge were whether the injury was within the jurisdiction of the Act and whether the landward extension of jurisdiction pursuant to the 1972 amendments is constitutional.

The administrative law judge held that this claimant was covered by the Act as amended as he was injured while assisting in the process of manufacturing barge components in an area adjoining navigable waters. The constitutional issue was preserved for appeal to the proper tribunal.

The petitioners take issue with the administrative law judge's conclusion of coverage. They question the determination that the claimant was engaged in maritime employment and they challenge the determination

that the situs of the injury was in an adjoining area as defined by the Act. 33 U.S.C. §903(a).

Section 2(3) of the Act defines "employee" to be "any person engaged in maritime employment, including a longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder. . . ." (emphasis added). 33 U.S.C. §902(3). The employer's principal business is constructing barges and towboats—shipbuilding. On the day he was injured the claimant was shaping steel deck or bottom plates to be incorporated into a barge. Certainly this work is in furtherance of the employer's business of new ship construction and must be deemed maritime employment as impliedly defined by Section 2(3) of the Act.

Jurisdiction of the Act is incomplete however unless the injury occurred in an "adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel". (emphasis added). 33 U.S.C. §903(a). In this regard the administrative law judge concluded as follows:

> The Respondents' facility is a large integrated shipyard specializing in the building of barges, towboats and other marine equipment for use afloat. While other manufacturing activities are conducted there for the convenience of management, they are a minor part of the total activities, and they do not change the nature of the operation as a maritime facility, adjoining navigable waters.

The record evidence clearly supports the administrative law judge's description and characterization of the facility; it is located on an island and is geared to the production of some 300 barges and towboats annually.

The claimant was injured in the structural shop where components of all types of marine products are preassembled. The employer places particular emphasis on the fact that a thoroughfare (Grand Avenue) passes between the structural shop and the major body of navigable water. The implication is that this thoroughfare effectively precludes the structural shop from being a part of the "adjoining area. . . ." The merit of this argument is illusory. The administrative law judge described the employer's operation as "a large integrated shipyard specializing in the building of barges. . . ." This is indeed the function of the facility. An adjoining area as defined in the Act must be deemed bounded only by the limits of its use as a maritime enterprise. This entire facility is designed and used for new ship construction. The mere fact that the island is bisected by a public road is of no consequence. The jurisdictional requirements of Section 2(3) and 3(a) of the Act are satisfied.

The final argument pressed by the petitioners' appeal is that if jurisdiction is found to lie then the amendment extending jurisdiction to adjoining areas is unconstitutional. As the Board has fully discussed this issue in *Coppolino v. I.T.O. Co., Inc.,* 1 BRBS 205 (Dec. 2, 1974), there is no reason to reiterate that discussion here.

Accordingly, the administrative law judge's Decision and Order on the merits is affirmed.

We Concur:

RUTH V. WASHINGTON, Chairperson
RALPH M. HARTMAN, Member
JULIUS MILLER, Member

Dated this 20th day of October, 1975.

SERVICE SHEET

BRB No. 75-145: LOUIS MAXIN v. DRAVO CORPORATION and LIBERTY MUTUAL INSURANCE CO. (74-LHCA-298)

Copies have been sent to the following parties:

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APPENDIX "D"

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20210

In the Matter of LOUIS MAXIN Claimant v. DRAVO CORPORATION Employer LIBERTY MUTUAL INSURANCE COMPANY Carrier	Case No. 74-LHCA-298 Formerly No. 3-6171

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(William J. Kilberg, Solicitor of Labor)
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U.S. Department of Labor
Washington, D.C. 20210
For the Director,
Office of Workers' Compensation Programs

Before: JOHN I. NEVIN
Administrative Law Judge

Decision and Order

Statement of the Case

Pursuant to the provisions of the Longshoremen and Harbor Workers' Compensation Act (33 USC Section 901 *et. seq.*), herein after referred to as the "Act" and the rules and regulations issued by the Secretary of Labor under authority therein contained (20 C.F.R. 702.331), a hearing in the above-captioned matter convened on October 30, 1974, in the city of Pittsburgh, Pennsylvania and continued thereafter until completed.

All parties were presented by counsel and were afforded opportunity to adduce evidence, examine and cross-examine witnesses, and to file briefs. Based upon the entire record and from observation, and evaluation of the demeanor of the witnesses I make the Findings of Fact, Conclusions of Law, and Order as set forth herein.

The findings of fact pertaining to the organization and operation of the Respondents industrial facility are common to four cases (*Maxin* 74-LHCA-298, *Kyne* 74-LHCA-299, *Gibbeaut* 74-LHCA-300, and *Green* 74-LHCA-301), of which this is one. These are based on exhibits and testimony of particular witnesses and are, by stipulation, applicable to all four cases.

Statement of the Issues

The primary issue between the parties is whether the claim herein comes within the jurisdiction of the Act as amended.

Secondarily, the Respondent argues that if the Amendments make the Act applicable to the facts before us, they are unconstitutional when so applied.

Findings of Fact

Dravo Corporation is a diversified conglomerate operating on a world-wide scale through subsidiaries. The facility on Neville Island is the Engineering Works Division. The functions carried out there are the design and building of large tow boats, and barges, steelmill equipment, and power plant equipment. Dravo operates the entire facility as one unit.

The facility in which the accidents occurred is located on a body of land called Neville Island located in the Ohio River a short distance down stream from Pittsburgh. The plant is closest to the southern shore of the river and generally is projected toward the north. The main stream of the river is on the north side of the facility. On the south side is a lesser stream called the back channel. It was stipulated that the main stream was a navigable waterway.

Historically, certain areas of the plant have always been considered by the parties to be subject to the jurisdiction of the Act. This area includes the Marine ways and the launching ways immediately adjacent to the waters edge on the north side. It is delineated by a heavy red line on a chart of the plant (Cl. Ex. 1).

Other significant areas of the facility include the boat yard area in which the construction of various types of vessels such as oil barges, coal barges, towboats, and floating cranes is underway (Cl. Ex. 1, item 1).

The Barge shop is another area in which construction of vessels is undertaken. The difference between it and the boat yard area is that in the former, the work is done undercover whereas in the latter, it is performed

in the open air. The Barge shop also conducts "preassembly" operations which is the fabrication of major components such as bow sections. These are later brought to the building ways and assembled to the bottom of the barges (Cl. Ex. 1, item 2). The Barge shop extension is about 250 feet from the north bank of the river (Res. Ex. 2).

A third area in which vessel construction takes place is the marine ways (Cl. Ex. 1, item 3). In addition, to new construction, repair of existing barges is also performed here. There are facilities for pulling the vessels out of the water in this area.

Repair work is also performed on barges which remain afloat in the area known as the "dock wall" (Cl. Ex. 1, item 4).

The launching of newly constructed vessels is undertaken from an area known as the launching ways which are on the north bank of the river to the west of the "dock wall" area (Cl. Ex. 1).

Still another segment of the plant is the area located on the south side of Grand Avenue. A major unit located there is the structural shop in which pre-assembly of components of all types including those of barges, towboats, damlocks, engine foundations, etc., is carried out (Cl. Ex. 1, item 5, Res. Ex. 2, Item 5). Some of the components such as "rake ends" range from 40 to 60 feet in width and 20 feet in length. Components fabricated in the structural shop are transported to other areas for assembly on rail cars (Cl. Ex. 1, Item 6).

The major raw material used in the construction of vessels is steel. The majority of the steel is delivered to a storage area adjacent to the structural shop by

truck or rail car (Cl. Ex. 1, Item 7). It is then brought into the structural shop as needed where it is shaped, cut, punched and welded to the desired configuration.

The structural shop is about 2000 feet from the North Channel of the river. Between the structural shop and the rivers edge is a "crane" track which runs parallel to the river, Respondent states it breaks the continuity of movement to the water's edge. Barges to be launched must cross the track to get to the launching site (Res. Ex. 2).

In addition, to marine construction, pelletizing machines and "feeders" which are used in handling iron ore and in making steel are also built in the structural shop. No other areas in the facility beside the structural shop are used for other than marine fabrication. During the previous twelve month period about eight pelletizing units were built. In that same period about 300 barges, and towboats were constructed.

The employees in the structural shop may spend 15 percent of their time on non-marine work and 85 percent on marine work. Ninety percent of the raw steel delivered to the shop finds its way into the marine products. The employees are assigned as needed; they do not specialize in either marine or non-marine work. Grand Avenue generally separates the structural shop from the pre-assembly and final assembly area.

Another area on the south side of Grand Avenue is the machinc shop (Cl. Ex. 1, Item 8). This area is partially used for pre-assembly construction. It is also used for machining shafts, fitting parts, etc. Components also move to assembly areas in the boat yard from the machine shop by rail.

On the north side of Grand Avenue, is an area where most of the towboats are assembled and put together (Cl. Ex. 1, Item 9). Installation of propulsion machinery etc., takes place here. From this point the towboats move to the launching area. In all, there are about 11 existing "positions" where work is performed which culminates in a finished vessel at the launching area.

Dravo employees perform fitting out services after launching the vessels. Substantial numbers of employees are engaged in all of the operations. The facility operates on three full shifts. The work classification of the employees such as ship fitters, welders, tackers, cranemen and riggers is fairly uniform throughout the facility. The facility operates generally in an assembly line order.

The back channel which is on the south side of the island is navigable most of its length. Barges have been stored afloat in that area.

It is stipulated that on 29 October 1973, Louis Maxin suffered an injury which resulted in the amputation of both legs below the knees.

Since 29 October 1973, and to the hearing date Maxin has been temporarily and totally disabled. He is undergoing rehabilitation therapy provided by Respondents to determine the extent of any future disability.

The Respondents have paid, and are paying compensation and medical benefits in accordance with Pennsylvania Law. To the extent that the longshoremen's Act is found to be applicable, Respondents are entitled to a credit against their liability under the Federal statute for sums paid pursuant to the State statute.

The benefits paid up to the date of the hearing were compensation (indemnity) in the amount of $5,200; and medical costs in the amount of $19,463.98.

Claimant's average weekly wage was $189.20. The benefits to which he would be entitled under the Federal statute would be $126.13, plus medical care as provided by the Act.

The employer-employee relationship existed throughout this period and the injury suffered, arose out of and in the course of such employment.

Claimant Maxin testified that he is married, and was first employed by Dravo in September, 1972. He was continuously employed in the structural shop, and progressed through various types of duties. [On 29 October, 1973, Claimant was a second class Burner. He was cutting corners or leveling edges on pieces of steel such as bottom plates, or deck plates which were eventually incorporated into a barge.]

While so engaged at his place of duty on the floor of the structural shop he was injured by a stack of steel which was behind him, and which fell, striking him.

Conclusions of Law

The Respondents facility is a large integrated shipyard specializing in the building of barges, towboats and other marine equipment for use afloat. While other manufacturing activities are conducted there for the convenience of management, they are a minor part of the total activities, and they do not change the nature of the operation as a marine facility, adjoining navigable waters.

The production employees of Respondent are typical shipbuilding employees. To the extent that they may be assigned to non-shipbuilding, activities such as construction of pelletizing machines for a minor part of their working time, the assignments are incidental and sporadic as the needs of the moment dictate. There is no delineation of labor between shipbuilding and non-shipbuilding functions. Neither is there any evidence before us that this Claimant was not engaged in shipbuilding activities when injured.

The general doctrine that in contract matters admiralty jurisdiction depends on the nature of the transaction, and in tort matters upon the locality, has been so frequently asserted by the Supreme Court that it must now be treated as settled (*Grant Smith—Porter Ship Co., v. Rhode,* 257 U.S. 409 42 S. Ct. 157 (1922) and cases cited therein).

As the Act relates solely to injuries occurring upon the navigable waters of the U.S., it deals with maritime law, and is applicable to matters that fall within the admiralty and maritime jurisdiction. The general authority of Congress to alter or revise the maritime law, which shall prevail uniformly throughout the country, is beyond dispute (*Crowell v. Benson,* 285 U.S. 22, 52 S. Ct. 285 (1932).

In amending and revising the maritime law the Congress cannot reach beyond the constitutional limits which are inherent in admiralty and maritime jurisdiction (*Crowell v. Benson, supra* p. 294). Unless the injuries to which the act relates occur upon navigable waters, they fall out side that jurisdiction. However, navigability is itself a question of fact, and where navigability itself is not in dispute, the locality of the

injury, that is whether it occurred upon the navigable waters, determines the existence of the congressional power to create the liability (*Crowell v. Benson, supra; U. S. Casualty Co. v. Taylor,* 64 F.2d 521 (4th Cir. 1933)).

Prior to 1962 it had been held that work upon a new ship launched, but not yet placed in navigation as an instrumentality of commerce was not maritime in the accepted meaning of that term (*U. S. Casualty Co. v. Taylor, supra,* citing *Grant Smith Porter Co. v. Rohde, supra.*

In 1962 the Supreme Court held that the Act applied to all injuries sustained by employees on navigable waters, regardless of whether they were working on completed vessels undergoing repair, or on a launched vessel, which was still under construction, (*Calbeck v. Travellers Insurance Co.* 370 U. S. 114, 82 S. Ct. 1196 (1962). In so doing the court cited with approval its prior decision in *Avondale Marine Ways, Inc. v. Henderson* (346 U. S. 366 74 S. Ct. 100 (1953) in which it had held that where an employee was killed while working on the repair of a vessel pulled out of the water on a "marine way," the marine way was a dry dock for purposes of the definition of navigable waters as including any dry dock.

In an opinion reviewing the situation as it existed in 1965, the Court of Appeals for the Ninth Circuit held that the phrase "any dry dock," as then used in the Act, was never intended to include building ways provided and used exclusively for new construction. Its conclusion was held to be supported by the fact that new ship construction was historically a non-maritime activity for the reason that prior to launching, the hull is a mere

piece of personal property whereas the moment the keel touches the water it becomes a subject of admiralty jurisdiction. Conversely, it was stated, ship repair had long been considered a maritime activity. The reasoning followed was that there was no difference in kind as to hull repairs depending upon whether the vessel is in dry dock afloat, or hauled upon ways on dry land, and admiralty jurisdiction extends to all. The Court noted that the character of a tort, as being maritime or non-maritime, had traditionally depended on the place of the injury, and that an injury upon dry land occurring in the performance of new ship construction was not maritime in nature and not subject to the Act (*O'leary* v. *Puget Sound Bridge and Dry Dock Co.,* 349 F.2d 571 (9th Cir. 1965).

The Supreme Court has reiterated the traditional view of maritime jurisdiction in two cases dealing with Longshoremen rather than shipbuilding, in which it held that injuries sustained on piers, which are extensions of land, are not injuries sustained upon the navigable waters and hence not within the coverage of the Act (*Nacirema Operating Co.,* v. *Johnson,* 396 U.S. 215, 90 S.Ct. 347 (1969)); *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202, 92 S.Ct. 418 (1971). In *Victory, supra,* the Court observed that the threshold issue was whether maritime law governs accidents suffered by a longshoreman injured on the dock by his stevedore employers equipment. It was held that, it did not. Maritime tort jurisdiction, it said, is governed by the locality of the accident and maritime law governs only those torts occurring upon the navigable waters of the United States. Thus, statutory language then in effect did not cover the cases. However, the Court pertinently observed that if denying federal remedies to longshoremen injured on

land is intolerable, Congress has ample power under Articles I and II of the Constitution to enact a suitable solution (*Victory Carriers, supra,* 404 U.S. 202, 217; *Coppolino* v. *International Terminal Operating Co., et al.* BRB 74-136 (2 Dec. 1974). This, we feel is exactly what Congress purported to do in the 1972 Amendments to the Act (Act of 27 Oct. 1972, P.L. 92-576, 86 Stat. 1251).

Countering the Claimant's assertion that the Amendments to the Act provide coverage to them, the Respondents argue that the 1972 amendments to the Act do not provide coverage to employees engaged in new ship construction on land; that this particular employee was injured a substantial distance from navigable waters and, that if the Amendments were construed to provide coverage under such circumstances, they would be unconstitutional. The particular language of the Act with which we are concerned, as amended and codified, includes the definitions of "employee" which means any person engaged in maritime employment, . . . including a ship repairman, shipbuilder, and shipbreaker . . . (33 USC 902(3)); the definition of "employer," which means an employer, any of whose employees are engaged in maritime employment, in whole or in part, upon the navigable waters of the United States including any adjoining . . . building way, marine railway, or other adjoining area customarily used by an employer in . . . repairing, or building a vessel (33 USC 902(4)); the definition of "vessel" which, as added, means any vessel upon which, or in connection with which, any person entitled to benefits . . . suffers injury or death arising out of, or in the course of his employment . . . (33 USC 902(21)).

Our concern also includes the general statement of coverage, which reads, in pertinent part: "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining . . . dry dock, . . . building way, marine railway, or other adjoining area customarily used by an employer in . . . repairing or building a vessel (33 USC 903(a)).

As an aid to determining the intent of Congress in employing particular statutory language it is not inappropriate to consult the legislative history of the Amendments. The Senate Report accompanying S. 2318 stated, inter alia, that the principal purpose of the bill was to amend the Act in order to . . . extend coverage to additional workers . . . (p. 63). Specifically, coverage was expanded to cover injuries "occurring in the contiguous dock area related to longshore and ship repair work (p. 64)." In commenting upon the Act prior to the Amendments the Report stated: "The present act, insofar as longshoremen, shipbuilders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present act stops at the waters edge; injuries occurring on land are covered by State Workmen's Compensation Laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the waters edge, and in which state, the accident occurs (p. 74). The report further stated: It is apparent that if the Federal benefit structure embodied in the Committee bill is enacted, there would be a substantial disparity in benefits payable . . . depending on which side of the water's edge the

accident occurred, if state laws are permitted to continue to apply to injuries occurring on land (p. 75). The report concluded that the compensation payable to a longshoreman, ship repairman, or shipbuilder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. . . . The intent of the committee was to permit a uniform compensation system to apply to employees who otherwise be covered by this act for only part of their activity (p. 75). (S. Report No. 92-1125, 92nd Cong., 2d Sess., 1-13; Legislative History of the Longshoremen and Harbor Workers' Compensation Act Amendments of 1972, pp. 63-75).

When reading the amended language in the light of the legislative history, there appears to be little question that shipbuilding on land was intended by Congress to be covered by the Act. [This is so even though there is no specific definition of maritime employment in the Act, and even though shipbuilding on land may not, historically, have been a maritime activity.] Having reached this conclusion we feel that the factors of distance from the waters edge, and separation from it by a public road, must be considered in the light of the phrase "other adjoining area customarily used by an employer in building a vessel." As we earlier concluded, the Respondents facility is a unified, integrated industrial plant devoted to marine construction. It "adjoins" navigable waters, i.e., the Ohio River, directly. The Claimant was on this "adjoining" property in the course of his employment. The fact that he may have been 100 or 1000 feet from the waters edge is a difference of degree and not of kind. Also, the fact that a public road intersected the property, (but did not alter or destroy its practical function), was incidental. The property contained private roads as well, and the Respondent used them all, both public, and private in furtherance of its shipbuilding activity. We therefore, find that in this case the entire facility was "adjoining" navigable waters within the meaning of the Act. (*Adkins* v. *I.T.O. Corporation, et al.* BRB 74-123 (29 Nov. 1974).

Respondent also contends that the Act, as we have construed it to cover shipbuilding "on land" when conducted in an adjoining area, is not constitutional. As we have already noted unassailable decisions have concluded that Congress has the power to legislate in the field of maritime jurisdiction and admiralty subject only to the constitutional limits which are inherent in the exercise of such jurisdiction. Whether the legislative enactment, broadening as it does the meaning of "navigable waters," exceeds those bounds is the question raised. It is not, however, for us to do more than note that Respondent has not waived this point, but has preserved it in this proceeding for such further consideration as may be due in a forum of competent jurisdiction. An administrative tribunal such as this must assume the validity of the legislation which it administers. It has no jurisdiction to entertain questions concerning the constitutionality of legislative enactments. (*Engineers Public Service Co.* v. *Securities and Exchange Commission,* 138 F.2d 936 951-53, (1943); *Salzano* v. *American Stevedores, Inc. et al.* 74-LHCA-266 (Nov. 18, 1974)).

The parties have stipulated that Claimant Maxin is entitled to compensation for temporary total disability, and that he is currently receiving rehabilitation therapy in order to determine the extent of future disability. The statute provides that a person having lost both

legs or feet shall, in the absence of conclusive proof to the contrary, be considered to be permanently and totally disabled (33 USC 908(a)). In cases of temporary total disability, the compensation is the same, during the continuance thereof, as for permanent total disability. This is so because the statutory limitation on the total amount payable in cases of other than permanent total disability and death is no longer in effect. (See 33 USC 914(m) as repealed). In view of the stipulation, the current rehabilitative therapy, and the Respondent's statutory right to offer conclusive proof that Claimant is not permanently, and totally disabled, it would be premature to conclude, as a matter of law, that he is so disabled at this time. Accordingly, we find that Claimant was temporarily and totally disabled from the date of the accident, 29 October 1973, until the present and continuing, and that he is entitled to compensation on that basis.

The Respondents were liable for and provided medical care from 29 October 1973. They shall continue to furnish, medical, surgical, and other attendance as provided in the Act for such period as the nature of injury and the process of recovery may require (33 USC 907(a)).

Respondents are entitled to a credit against their liability for compensation herein for the compensation paid to Claimant pursuant to the Pennsylvania Compensation Act. This sum, up to the date of the hearing, was stated to be $5,200.

Interest on the net amount due to Claimant herein is payable at the rate of 6 percent per annum from the date each payment was due until paid (*Strachan Shipping Co.*, v. *Wedemeyer,* 452 F.2d 1225 (5th Cir. 1971); *Ryan* v. *McKie Co. et al.* BRB-74-160 (Dec. 10, 1974).

Approval of an attorney fee in the amount of $131.25 was requested by Claimant. We find this sum to be reasonable and that it should be paid directly by Respondent to Claimant in a lump sum as soon as the order becomes final (33 USC 928(a) as amended).

ORDER

Claimant Maxin shall be paid compensation for temporary total disability at the rate of $126.13 per week from the date of the injury 29 October 1973, to the present and continuing thereafter, pursuant to the provisions of the Act until otherwise ordered.

Respondents shall continue to furnish in future, pursuant to the Act, all medical, surgical, and other attendance for such period as the nature of the injury and the process of recovery may require.

Respondents are entitled to a credit against their liability herein for benefits paid to Claimant Maxin pursuant to the Pennsylvania Compensation Act.

Interest on the net amounts due to Claimant Maxin herein is payable at the rate of 6 percent per annum from the date each payment was due until paid.

An attorney fee in the amount of $131.25 is approved and shall be paid by Respondents directly to Claimant's attorney as soon as this order becomes final.

JOHN I. NEVIN
Administrative Law Judge

Dated: February 28, 1975
Washington, D. C.

Certificate of Filing and Service

I certify that on March 11, 1975 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Third Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mr. Louis Maxin, Claimant c/o Daniel Cooper, Esquire, 1708 Law & Finance Bldg., Pitts., Pa. 15219.

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For the claimant.

A copy was also mailed by regular mail to the following:

Judge John Nevin, Office of Administrative Law Judges, U. S. Department of Labor, Washington, D.C. 20210

Office of the Solicitor, U. S. Dept. of Labor, Division of Employee Benefits, Rm. 4221, Main Labor Bldg., Wash., D.C. 20210

Director, Office of Workmen's Compensation Programs (LS/HW) U. S. Department of Labor, Washington, D.C. 20211

DONALD FREDERICK
Deputy Commissioner

Third Compensation District
U. S. Department of Labor
EMPLOYMENT STANDARDS
ADMINISTRATION

Office of Workmen's Compensation Programs